No. 89-65

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND FORT STEWART ASSOCIATION OF EDUCATORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

WILLIAM E. PERSINA*
Acting Solicitor
PAMELA P. JOHNSON
Attorney
Federal Labor Relations Authority
500 C Street, SW.
Washington, D.C. 20424
(202) 382-0781
**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Cases – Continued: Page

Statutes, rules, and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-65

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND FORT STEWART ASSOCIATION OF EDUCATORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

INTRODUCTION

On July 14, 1989, Fort Stewart Schools ("Army" or "Schools") petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The opinion of the court of appeals is reported at 860 F.2d 396, and is appended to the petition (Pet. App. 1a-30a).

It is the position of the respondent Federal Labor Relations Authority (Authority) that the unanimous Eleventh Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of a major issue in this case, causing uncer-

tainty for all participants in federal government labor-management relations. Moreover, resolution of these issues are of considerable importance because they involve the negotiability of pay and money-related fringe benefits for a particular group of federal employees. Further, resolution of this case will impact on a range of issues important to federal sector labor relations, such as what constitutes negotiable conditions of employment under Title VII of the Civil Service Reform Act of 1978; and the extent of the right of federal agency management under that Act to determine its budget. Accordingly, the Authority does not oppose granting the present petition.

STATEMENT

A. Background

1. The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Statute), as amended, 5 U.S.C. 7101-7135. Under the Statute, the responsibilities of the Federal Labor Relations Authority (the Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in

the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with the exclusive bargaining representatives about unit employees' "conditions of employment." 5 U.S.C. 7103(a)(12). See also *Equal Employment Opportunity Commission* v. *FLRA*, 744 F.2d 842, 850 n.18 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986) ("conditions of employment" under Section 7103(a)(14) of the Statute to be construed broadly, to include the working situation and employment relations of bargaining unit employees). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *" except to the extent, among other things, that a matter is "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a); *FLRA* v. *Aberdeen Proving Ground, Department of the Army*, 108 S. Ct. 1261, 1262 (1988).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "to determine the * * * budget." 5 U.S.C. 7106(a)(1). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely af-

fected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

Additionally, although strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7), Congress established a Federal Service Impasses Panel ("FSIP" or "Panel"). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. Either party may request the Panel to conduct an inquiry into a bargaining impasse. If, after the Panel makes initial recommendations to the parties they still cannot reach a settlement, "the Panel may—(i) hold hearings; (ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas * * *; and (iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse." 5 U.S.C. 7119(c)(5)(B). See generally 5 C.F.R. 2471.1 to 2471.12. When the Panel imposes a term on the parties it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Panel does not have authority to pass judgments on assertions of nonnegotiability. The resolution of negotiability issues are made by the Authority.

In the instant case, the Authority adjudicated a dispute over whether collective bargaining proposals were within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusve representative may appeal the agency's allegation of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain

over the proposal. 5 C.F.R. 2424.10. The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

2. 20 U.S.C. 241

20 U.S.C. 241 authorizes the operation by federal agencies of schools in the United States which provide a free public education for eligible dependents children of military and civilian personnel who reside on federal property. For most federal employees Congress set specific wage and salary scales and classifications. However, Congress has not established specific wage and salary scales for dependents school employees. Title 20 U.S.C. 241(a) provides that "personnel may be employed and the compensation, tenure, leave, hours of work and other incidents of the employment relationship *may be fixed without regard to the Civil Service Act and rules* * * *" and specified portions of Title 5. 20 U.S.C. 241(a) (emphasis added).

Title 20 U.S.C. 241(a) also requires the dependents schools to ensure that education at its schools is "comparable to free public education provided for children in comparable communities in the State." 20 U.S.C. 241(a). In providing comparable education, dependents schools must comply with 20 U.S.C. 241(e), which provides that "to the maximum extent practicable" the Secretary shall limit total payments made for such education to an amount per pupil that does not exceed the amount spent in comparable communities in the state. 20 U.S.C. 241(e).

B. Proceedings in the Present Case

1. The Authority's Decision

This case arose during the course of collective bargaining negotiations between the Fort Stewart (Georgia) Association of Educators ("FSAE" or "union") and the Schools (Pet. App. 2a). Fort Stewart Schools is one of the dependents schools established under 20 U.S.C. 241 (Pet. App. 2a). The union represents all professional and nonprofessional employees at the Fort Stewart Schools—specifically, teachers, and other school employees (Pet. App. 2a).

During negotiations, the Schools objected to three bargaining proposals concerning salary and benefits presented by the union for bargaining (Pet. App. 2a).[1] The first proposal included sections which set mileage reimbursement, mandated certain insurance programs, and gave the union the right to review and comment on salary schedules (Pet. App. 31a-34a). The second proposal suggested a fixed salary increase of 13.5 percent for the teachers and other employees for the subsequent school year (Pet. App. 34a). The third proposal detailed various leave practices such as personal leave, sick leave, professional leave, maternity leave, and leave without pay (Pet. App. 48a-54a). The Authority concluded that most of proposal 1; all of proposal 2; and most of proposal 3 were within the agency's duty to bargain (Pet. App. 45a).

a. First, the Authority (Chairman Calhoun dissenting in part) determined that the agency had not supported its argument that the union's proposals do not concern conditions of employment (Pet. App. 35a). The Authority stated (Pet. App. 35a) that it had consistently held that

[1] The text of union proposals 1, 2, and 3 is appended to the petition (Pet. App. 31a-34a, 48a-54a) filed by the Army in this case.

nothing in the Statute or its legislative history prevents bargaining over employee compensation insofar as (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable government-wide rule or regulation, or any agency regulation for which a compelling need exists. The Authority cited (Pet. App. 35a) in support its decision *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. 377 (1986) (*Eglin*) (Chairman Calhoun dissenting).[2]

[2] In *Eglin*, the Authority's lead decision in this area, the Authority found negotiable a proposal that a Nonappropriated Fund Instrumentality (NAFI) absorb 75% of the cost of health insurance. Health insurance for NAFI employees is not governed by law. After surveying the general scheme for setting pay and fringe benefits for federal employees, the scope of bargaining under the Statute, and rulings by the Federal Labor Relations Council under E.O. 11491, as amended, 3 C.F.R. 861 (1966-1970 Comp.), the Authority concluded that Congress intended wages and fringe benefits to be considered the same for negotiability purposes as other conditions of employment under the Statute (24 F.L.R.A. at 378-81). The Authority held in *Eglin* that various statements by legislators in the legislative history of the Statute, to the effect that pay matters would be nonnegotiable, reflected Congress' intent to bar pay negotiations only insofar as pay was specifically provided for by law (24 F.L.R.A. at 382-83). The Authority noted in this connection (24 F.L.R.A. at 379) the absence of any language in the Statute barring negotiations on pay; and the exclusion from the Statute's definition of "conditions of employment" of "matters • • • specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C). Thus, bargaining proposals concerning matters, including wages and money-related fringe benefits, which are not specifically provided for by federal law are negotiable to the extent they are not inconsistent with applicable laws and regulations (24 F.L.R.A. at 383).

Turning to the particular proposal at issue in *Eglin*, the Authority found that proration of health insurance costs for NAFI employees is

The Authority indicated that the employees covered by the proposals are employed under the provisions of 20 U.S.C. 241 (Pet. App. 36a). The Authority stated that it had previously held that nothing in 20 U.S.C. 241 or its legislative history indicated that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which would be adopted (Pet. App. 36a). The Authority cited (Pet. App. 36a) in support its decision *Fort Knox Teachers Association and Fort Knox Dependent Schools*, 26 F.L.R.A. 934 (1987) (*Fort Knox Dependent Schools*) (Chairman Calhoun dissenting), petition for review filed sub nom. *Fort Knox Dependent Schools* v. *FLRA*, Nos. 87-3593/87-3742 (6th Cir. June 25, 1987).

In *Fort Knox Dependent Schools*, 26 F.L.R.A. at 935-38, the Authority found a proposal concerning sabbatical leave, similar to a portion of proposal 3 here at issue, neither conflicted with the express terms of 20 U.S.C. 241 nor the intent of Congress underlying that provision. The Authority in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, rejected arguments that a proposal would conflict with the cost limitation provisions of 20 U.S.C. 241(e) simply by causing increased costs in a particular area of personnel compensation such as leave. Such an increase, the Authority held in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, would not necessarily cause the agency to exceed the limitations on total per pupil cost of providing an education, noting that compensation is only one aspect of total cost.

---

not a matter of specifically provided for by law, and is therefore a "condition[] of employment" under Section 7103(a)(14)(C) of the Statute (24 F.L.R.A. at 384). Further, the Authority rejected the agency's claim that the union's proposal was inconsistent with management's right to determine its budget, and with an agency regulation allegedly supported by a compelling need (24 F.L.R.A. at 386-88).

b. Second, the Authority rejected the Army's claim that the proposals interfered with the Army's right to determine its budget under Section 7106(a)(1) of the Statute (Pet. App. 36a-37a). The Authority stated its long standing principle that in order to demonstrate that a union proposal directly interferes with management's right to determine its budget under Section 7106(a)(1), it is necessary for the agency either to show that the proposal prescribes the programs and operations to be included in the agency's budget or the amount to be allocated for them; or to make a substantial demonstration that the anticipated increase in costs is significant and unavoidable and is not offset by compensating benefits (Pet. App. 36a).

The Authority stated that the Army had not made a substantial demonstration that implementation of the proposals would result in a significant, unavoidable increase in costs not offset by compensating benefits (Pet. App. 37a). The Authority indicated that the record failed to show how many employees would actually be affected by the proposals, or the monetary increase which would be directly attributable to implementation of the proposals in the subject bargaining unit or in other bargaining units within the system (Pet. App. 37a).

The Authority also determined that the Army had failed to show that any increased costs occasioned by the proposals would not be offset by compensating benefits (Pet. App. 37a). The Authority rejected the Army's contention that Congress' exempting teachers from the statutes governing pay and certain benefits for government employees constitutes a finding that increases in teachers' pay are not offset by compensating benefits (Pet. App. 37a-38a). The Authority found the congressional action could not be construed to cover the alleged cost increase which would result from implementing the proposals involved in this

case within the bargaining unit (Pet. App. 38a). Finally, the Authority noted that while the consequences of a proposal may be considered in the collective bargaining process, if concerns such as agency cost prevented the parties from reaching agreement, that consideration could be presented to the Federal Service Impasses Panel pursuant to Section 7119 of the Statute (Pet. App. 38a).

c. Finally, the Authority turned to the Army's assertion that the proposals conflict with the Army's regulation, designated AR 352-3, for which the Army alleged a "compelling need" exists within the meaning of 5 U.S.C. 7117(a)(2) and (b) (Pet. App. 40a-41a). The Authority pointed out (Pet. App. 40a-41a) that substantially the same argument was raised by the agency to support its claim that there was a compelling need for AR 352-3 to bar negotiations of proposal 4 in *Fort Knox Teachers Association and Board of Education of the Fort Knox Dependents Schools*, 27 F.L.R.A 203 (1987), petition for review filed sub nom. *Board of Education of the Fort Knox Dependents Schools* v. *FLRA*, Nos. 87-3702/87-3853 (6th Cir. July 24, 1987) (*Fort Knox Teachers Association*). In that case the Authority found "nothing in either the law or its legislative history which persuades [the Authority] that Congress intended to restrict the Agency's discretion as to the particular employment practices which could be adopted" (Pet. App. 41a). *Fort Knox Teachers Association*, 27 F.L.R.A. at 216. Consequently, the Authority indicated here as it had held in *Fort Knox Teachers Association*, that the agency failed to sustain its burden of showing a compelling need for the regulation (Pet. App. 41a). Moreover the Authority stated in the instant case even assuming the Army had supported its compelling need argument, the agency had not shown how several portions of proposal 1, which assume that pay rates will be fixed in

accordance with pay practices in comparable school systems, conflicted with the Army's regulation (Pet. App. 41a).

2. The Court of Appeals' Decision

Fort Stewart Schools petitioned the Eleventh Circuit to review the Authority's decision (Pet. App. 1a). On November 21, 1988, a unanimous panel of the Eleventh Circuit affirmed and enforced the Authority's decision and order (Pet. App. 1a-30a). The court of appeals held that the Army was required to bargain over the union's proposals involving salaries and fringe benefits of School employees (Pet. App. 6a-21a). In reaching this conclusion the court of appeals made three basic holdings (Pet. App. 6a-21a).

a. First, the court of appeals determined that the Army had a statutory duty to bargain because the union's proposals involve "conditions of employment" within the Army's discretion (Pet. App. 6a-17a). The court of appeals indicated that the Authority had determined in prior decisions that the Statute did not prohibit bargaining over compensation and fringe benefits when: "Congress has not specifically provided for these matters; and the proposals do not conflict with law, government-wide rule or regulation, or an agency regulation for which a compelling need exists" (Pet. App. 7a; citation omitted). The court of appeals determined that the Statute and its legislative history supported the Authority's conclusion (Pet. App. 7a). The court of appeals explained that the Statute's definition of "conditions of employment" does not exclude compensation and fringe benefits (Pet. App. 7a).

The court rejected the Army's argument that the definition of "conditions of employment" in the Statute encompasses a narrower range of bargainable matters than under

Section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(d),[3] because the Statute does not specifically list wages and hours as bargainable matters (Pet. App. 8a). The court found that the absence of such terms did not prove Congress intended to exclude "wages" and "hours" from negotiation (Pet. App. 8a). Rather, the court explained that Congress' use of the word "other" in Section 8(d) shows that Congress considered wages and hours to be conditions of employment (Pet. App. 8a). In the Statute, the court stated Congress simply used the general term "conditions of employment" which encompasses wages, to define the scope of negotiable matters (Pet. App. 8a).

The court also rejected the Army's argument that Section 704 of the Civil Service Reform Act of 1978, 5 U.S.C. 5343 note, indicates congressional intent against bargaining on wages for federal employees not covered by a provision like Section 704 (Pet. App. 8a). That section authorizes certain groups of federal prevailing rate employees to negotiate on, among other things, pay matters. The court found that the legislative history of Section 704 indicates that the section was intended to continue an exclusion of certain employees from the Prevailing Rate Systems Act of 1972, Pub. L. No. 92-392, 86 Stat. 564 (codified at 5 U.S.C. 5341-5349), which Act would have specifically provided for the employees' pay but for the exclusion (Pet. App. 8a-9a).

Turning to the legislative history of the Statute, the court agreed with the Authority and the Second Circuit in *West Point Elementary School Teachers Assoc.* v. *FLRA*, 855 F.2d 936, 939-40 (2d Cir. 1988) (*West Point*), that

[3] Section 8(d) of NLRA states in relevant part that "wages, hours, and other terms and conditions of employment" are subject to bargaining in the private sector.

legislators' remarks during debate on the Statute concerning negotiation on wages reflected an intent to bar negotiation only insofar as wage matters were regulated by Congress in legislation (Pet. App. 9a-13a).

The court also agreed with the Authority and the Second Circuit that the proposals were not inconsistent with 20 U.S.C. 241 (Pet. App. 13a). The court determined that the language of Section 241 does not specifically provide for the wages of school employees; nor does that section require identical salaries between dependents schools and local schools (Pet. App. 13a-16a).

b. Next, the court concluded the Army had not established a compelling need for its regulation that mandates equality of compensation between employees in dependents schools (Pet. App. 17a-19a). The court agreed with the Authority and the Second Circuit that the Army regulation does not "implement a mandate to the Army since Section 241 does not require the Army to compensate its school employees according to local public school practices" (Pet. App. 18a). As the Second Circuit had concluded, 855 F.2d at 943, the court determined that the regulation was not "essential" to the Army providing a comparable education at comparable cost (Pet. App. 18a). The court found that the Army could achieve both of these goals notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the per pupil expenditures (Pet. App. 18a-19a). Moreover, the court stated Section 241 requires equality only to the maximum extent possible, not exact equality (Pet. App. 19a).

c. Finally, the court agreed with the Authority's conclusion that the union's proposals did not interfere with the Army's right to determine its own budget (Pet. App. 19a-20a). Similar to the Second Circuit, 855 F.2d at 943-44, the court deferred to the Authority's decision that

the proposals do not invade the Army's right to make its budget (Pet. App. 20a). The court agreed with the Authority that the Army had not demonstrated that the proposals would cause substantial and unavoidable cost increases (Pet. App. 20a). The Army did not specify any amount by which the proposed matters would increase its budget (Pet. App. 20a). Further, the court found that the Army did not establish that no compensating benefits would offset such costs even if its costs increased (Pet. App. 20a). In sum, the court denied the Army's petition for review and granted the Authority's petition to enforce the Authority order (Pet. App. 21a).

d. Fort Stewart Schools filed with the court below a petition for rehearing with suggestion for rehearing en banc. On February 17, 1989, both the petition for rehearing and the suggestion for rehearing en banc were denied, with no judge voting in favor of it (Pet. App. 55a-56a).

THE AUTHORITY DOES NOT OPPOSE THE PETITION

The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the several courts of appeals that have considered the issue of the negotiability of pay and money related fringe benefits for certain groups of federal employees have reached varying results.

There is a direct conflict in the courts of appeals on the question of whether compensation is a "condition[] of employment" under the Statute subject to collective bargaining in an agency whose pay schedules are not fixed by law. The Second Circuit[4] and the court below have held that pay/fringe benefit matters involving Department of Defense Dependents Schools (DODDS) domestic teachers

[4] *West Point Elementary School Teachers Assoc.* v. *FLRA*, 855 F.2d 936, 939-40 (2d Cir. 1988).

covered by 20 U.S.C. 241 may be bargained on to the extent consistent with law and applicable regulation. On the other hand, the Sixth Circuit recently reversed an Authority decision and order involving the same type of employees, finding that pay matters are not within the scope of the bargaining obligation under the Statute. *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179 (6th Cir. 1989) (*Fort Knox*). The D.C. Circuit, in cases involving teachers at overseas dependents schools, which are governed by a different statute (20 U.S.C. 902) from that governing domestic dependents schools, noted in finding that pay matters are not negotiable "conditions of employment" that it was fully aware of contrary decisions on this issue by the Second Circuit and the court below. *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 991 n.3 (D.C. Cir. 1988) reh'g en banc granted (Feb. 6, 1989) (*DODDS Schools*).

In addition, the Third Circuit has ruled that for federal civilian mariners covered by 5 U.S.C. 5348, pay issues are not negotiable "conditions of employment" under the Statute. *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409 (3d Cir. 1988). Recently, the Fourth Circuit held en banc, in reversing a panel decision involving pay issues concerning Nuclear Regulatory Commission employees who are excepted from the general civil service laws, that pay issues are not negotiable under the Statute. *Nuclear Regulatory Commission* v. *FLRA*, No. 87-3182 (4th Cir. July 14, 1989 (*NRC*), petition for cert. filed sub nom. *National Treasury Employees Union* v. *United States Nuclear Regulatory Commission, et al.*, 58 U.S.L.W. 3114 (U.S. Aug. 3, 1989) (No. 89-198). This kind of circuit split means that different employees in different parts of the country have different rights to bargain through their exclusive representatives on pay

matters.[5] Although the total number of federal employees who are in a position to bargain on pay matters is relatively small compared to the overall federal civilian work force, the importance of this issue to those employees makes this kind of disparity a strong basis for granting the petition in this case.[6]

Moreover, if the Court concludes that compensation is a negotiable "condition[] of employment" under Section 7103(a)(14) of the Statute, it will need to resolve two other issues. Those issues concern whether the proposals conflict

[5] Various pay and fringe benefit cases are pending in courts of appeals as of the date of this memorandum. The Sixth Circuit has three domestic teacher pay/fringe benefit cases which have been stayed pending the resolution of *Fort Knox*. The Eleventh Circuit has two other cases stayed pending Supreme Court action in this case. *United States Army Aviation Center, Ft. Rucker, Georgia* v. *FLRA*, No. 87-7783 (11th Cir. proceedings stayed Apr. 5, 1989) (reviewing 29 F.L.R.A. 1447 (1987)); *United States Marine Corps Logistics Base, NAFI, Albany, Georgia* v. *FLRA*, No. 88-8006 (11th Cir. proceedings stayed Apr. 24, 1989) (reviewing 29 F.L.R.A. 1587 (1987)). The Ninth Circuit has a NAFI pay/fringe benefit case pending, *Department of the Army, United States Army Support Command, Fort Schafter, Hawaii* v. *FLRA*, No. 88-7004 (9th Cir. argued Jan. 10, 1989) (reviewing 29 F.L.R.A. 1553 (1987)). Finally, the D.C. Circuit has three pay/fringe benefit cases which have been stayed pending resolution of the petition for rehearing en banc in *DODDS Schools. FLRA* v. *FDIC*, No. 87-1716 (D.C. Cir. submitted on the briefs Jan. 6, 1989) (involving pay for FDIC employees); *FLRA* v. *FDIC*, No. 87-1717 (D.C. Cir. argued Jan. 6, 1989) (involving fringe benefits for FDIC employees); *Department of the Army, Fort Bragg Schools* v. *FLRA*, No. 88-1132 (D.C. Cir. argued Jan. 19, 1989) (involving pay/fringe benefits for domestic DODDS teachers).

[6] Although the Authority agrees with respondent FSAE to the extent it claims the percentage of the federal civilian workforce affected by this issue is relatively small (FSAE Br. Op. at 1-5), the Authority does not concur that the numbers of employees involved are so small as not to warrant review of the question in this Court.

with management's right to determine its budget under Section 7106(a)(1); and whether the Army has established a compelling need for its regulations which would bar bargaining on the proposals under Section 7117(a)(2).

At this point there does not appear to be a direct conflict among the circuits on the question of whether compensation-related proposals conflict with management's right to determine its budget under Section 7106(a)(1).[7] However, there is a direct conflict on the issue of whether there is a "compelling need" for the Army regulation providing that compensation rates at dependents schools equal those of the local schools. Like the Second Circuit in *West Point*, the court below has agreed with the Authority's analysis on this issue, while the Sixth Circuit held to the contrary, disagreeing with the court below and the Second Circuit.

[7] The absence of a majority of the participating judges joining in the resolution of the budget issue in *NRC* means that Fourth Circuit precedent remains open on this issue. See, *e.g.*, *Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910) ("but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts"); *NLRB* v. *J-Wood/A Tappan Division*, 720 F.2d 309, 319 n.1 (3d Cir. 1983) (Gibbons, J., noting the absence of an opinion of the ten-member court on an issue where the vote was 5-4, with one judge concurring in the result but not the reasoning of the five-judge opinion in *NLRB* v. *ARA Services, Inc.*, 717 F.2d 57 (3d Cir. 1983) (en banc)); *Beron* v. *Kramer-Trenton Company*, 402 F. Supp. 1268, 1277 (E.D. Pa. 1975) ("only those holdings which muster majority approval may be accorded precedential value"); *People* v. *Jackson*, 212 N.W.2d 918, 921 (Mich. S. Ct. 1973) (in a decision with 7 judges participating, "[s]ince neither opinion obtained four signatures, neither is binding under the doctrine of *stare decisis*."

Accordingly, the Authority does not oppose granting the present petition.[1]

Respectfully submitted.

WILLIAM E. PERSINA*
Acting Solicitor
PAMELA P. JOHNSON
Attorney
**Counsel of Record*

SEPTEMBER 1989

[1] The Acting Solicitor General authorizes the filing of this memorandum by Respondent Federal Labor Relations Authority.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-609/82073